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Supreme Court, U.S.
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No. 04-1293

IN THE

Supreme Court of the United States

LOUISE E. LUALLEN,

Petitioner,

v.

GUILFORD HEALTH CARE CENTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Fourth Circuit's fact-bound, one-paragraph affirmance of the District Court's grant of summary judgment to Respondents with respect to Petitioner's employment discrimination claims, particularly where the District Court struck Petitioner's evidence in opposition to summary judgment and Petitioner waived her right to appeal from this ruling.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Guilford Healthcare Center, Inc., states that it has no parent corporations and that there are no publicly held companies that own more than 10% of its stock. Medical Facilities of North Carolina, Inc., states that it has no parent corporations and that there are no publicly held companies that own more than 10% of its stock.

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I

INTRODUCTION

The question presented in the petition does not warrant review by this Court. Petitioner identifies no departure from the accepted and usual course of judicial proceedings on a summary judgment motion nor has she shown any compelling reason for review of this routine employment discrimination case. The record demonstrates that the District Court carefully considered the evidence and correctly found that Petitioner failed to establish a *prima facie* case of discrimination or retaliation, or offer evidence rebutting the legitimate, nondiscriminatory reasons proffered for Petitioner's termination. In a one paragraph *per curiam* opinion, the Fourth Circuit Court of Appeals affirmed the denial of Petitioner's claims on the reasoning of the District Court. Petitioner now attempts simply to re-argue the merits of her case, notwithstanding the fact that her evidence has been stricken, and she has waived her right to appeal the decision striking her evidence. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

Respondent Guilford Healthcare Center, Inc. ("GHCC") provides long term residential health care for the elderly. Respondent Medical Facilities of North Carolina, Inc.[1] ("MFNC") is a management company providing administrative services to nine nursing home facilities in

[1] MFNC is not the parent company of GHCC and did not have an ownership interest in GHCC. Thus, MFNC was not Petitioner's employer for the purposes of § 1981, Title VI, or Title VII, and summary judgment was properly granted by the District Court. Petitioner did not appeal this issue to the Fourth Circuit and does not raise it in the petition.

North Carolina, including GHCC (collectively referred to herein as the "Respondents"). Petitioner Louise Luallen[2] ("Petitioner"), an African-American, filed this action against Respondents after being terminated by GHCC for multiple work rule violations, including insubordination, failure to take call, open defiance of a supervisor's instruction, conduct harmful to GHCC, its residents, and associates, and abusive language. Pet. App. 24a. Petitioner sought damages for alleged racial discrimination and retaliation by Respondents under 42 U.S.C. § 1981, 42 U.S.C. § 2000c (Title VII) and 42 U.S.C. § 2000d (Title VI).[3] *Id.* at 8a.

On September 5, 2003, Respondents moved for summary judgment with respect to all of Petitioner's claims.[4] Pet. App. at 10a. On October 1, 2003, Petitioner filed an untimely response in opposition to Respondents' motion for summary judgment. *Id.* Respondents moved to strike Petitioner's response to the motion for summary judgment. *Id.* On December 18, 2003, United States District Judge William J. Osteen granted Respondents' motion for summary judgment and motion to strike Petitioner's response. *Id.* at 31a. Although the District Court granted Respondents' motion to

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[2] In addition to Luallen, five other plaintiffs participated in the action in the District Court. None of the other plaintiffs in the action below are involved in the petition.

[3] Petitioner did not appeal the dismissal of her Title VI claim to the Court of Appeals.

[4] Although Petitioner mentions a "hostile environment" on page 5 of the petition, Petitioner did not plead a hostile work environment claim in the complaint. As such, Petitioner cannot argue such a claim now. *See Bass v. E.I. Dupont De Nemours & Co.*, 324 F.3d 761, 764–65 (4th Cir.), *cert. denied*, 124 S. Ct. 301 (2003).

strike, the District Court demonstrated throughout its Memorandum Opinion that it considered the content of Petitioner's response before granting the motion for summary judgment. *Id.* at 13a, 15a, 16a, & 29a.

With regard to Petitioner's discrimination claims, the District Court found that, even when the evidence was viewed in the light most favorable to her, Petitioner had failed to establish multiple elements of her *prima facie* case. The District Court found that she could not show that her job performance was satisfactory or that employees who were not members of the protected class were treated differently. Pet. App. 19a-20a. The District Court also found that many of the litany of the incidents complained of by Petitioner did not constitute adverse employment actions. *Id.* at 18a-19a. Furthermore, the District Court found that, even if it had not stricken her response, Petitioner failed to offer evidence, other than her own self-serving allegations, to rebut the legitimate non-discriminatory reasons proffered for her termination. *Id.* at 21a-22a.

With regard to her retaliation claim, the District Court found that Petitioner failed to produce evidence of a causal relationship between her participation in a protected activity and her termination, or evidence rebutting the legitimate, nondiscriminatory reasons proffered by Respondents. Pet. App. 23a-25a.

Petitioner moved, under Rule 60(b), to vacate the Order and Judgment entered by the District Court, arguing that the judgment should be set aside because the delay in responding to the motion for summary judgment was not attributable to Ms. Luallen. Pet. App. 5a. On June 14, 2004, the District Court denied Petitioner's motion to vacate, noting again that it considered the merits of the case and the evidence in support of Petitioner's response in reaching its decision.

Id. at 6a. Petitioner appealed both rulings to the Fourth Circuit Court of Appeals. On November 24, 2004, the Court of Appeals affirmed the District Court *per curiam*. *Id.* at 3a. In its one paragraph opinion, the Court of Appeals noted that Petitioner waived her right to appeal the District Court's denial of her Rule 60(b) motion by failing to comply with Fed. R. App. P. 28(a)(9)(A). *Id.*

REASONS FOR DENYING THE PETITION

The petition fails to provide any justification for this Court to review the question presented. First, Petitioner ignores the fact that her evidence has been stricken and that she has waived her right to appeal that decision. Second, although Petitioner asserts that the Court of Appeals sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings on a summary judgment motion, the record demonstrates that the District Court carefully considered the merits of Petitioner's case, as well as her stricken evidence, and correctly entered judgment in favor of Respondents. Petitioner failed to establish a *prima facie* case of discrimination or retaliation, or offer evidence that the reasons given for Petitioner's termination were a pretext for discrimination. Third, the petition entirely fails to address the District Court's determination that Petitioner failed to rebut Respondents' proffered reasons for her termination or point to any evidence that could show these reasons to be pretextual.

For these reasons, as explained more fully below, the petition should be denied.

A. Petitioner's Evidence Has Been Stricken And Petitioner Has Waived Her Right To Appeal That Decision

As stated above, the District Court struck Petitioner's untimely response in opposition to Respondents' motion for summary judgment and any documents supporting the response. Pet. App. 31a. After the District Court granted summary judgment to Respondents, Petitioner moved to vacate the Court's order, under Rule 60(b), arguing that her response should not have been stricken because the neglect was attributable to her attorney. *Id.* at 5a. Petitioner's Rule 60(b) motion was denied. On appeal, the Fourth Circuit held that Petitioner had waived her right to appeal this denial. *Id.* at 3a. Accordingly, the record should not contain any of Petitioner's evidence, and Petitioner has no right to appeal the decision striking this evidence.

Once Petitioner's evidence was stricken, the District Court could have immediately granted Respondents' motion for summary judgment as uncontested. Pet. App. 13a, n.1. Nevertheless, as discussed below, the Court went beyond its obligation and considered the merits of the case, even considering Petitioner's stricken response. As such, Petitioner cannot show that the Court of Appeals sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings on a summary judgment motion.

B. The Court of Appeals Correctly Affirmed The District Court's Finding That Petitioner Failed To Establish A *Prima Facie* Case Of Discrimination And Failed To Rebut Respondents' Legitimate Non-Discriminatory Reasons For Her Termination

Having no direct evidence of discrimination, Petitioner was required to prove her claims through the disparate treatment framework of proof developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). Under this framework, a plaintiff may establish a *prima facie* case of discrimination by showing: (1) membership in a protected class; (2) qualification for her position and satisfactory performance; (3) an adverse employment action; and, (4) different treatment of similarly situated employees outside the protected class. *McDonnell Douglas*, 411 U.S. at 802; *see also Bryant v. Bell Atlantic Maryland, Inc.*, 288 F.3d 124, 133 (4th Cir. 2002); *Karpel v. Inova Health Care Sys. Services*, 134 F.3d 1222, 1228 (4th Cir. 1998). If the plaintiff establishes a *prima facie* case, the defendant then must articulate a legitimate, nondiscriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802; *Bryant*, 288 F.3d at 133. The plaintiff is then required to show that the proffered reason was a pretext for unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 804; *Bryant*, 288 F.3d at 133.

The District Court found that Petitioner had not established all of the elements of a *prima facie* case of discrimination. Petitioner did not produce evidence that her performance was satisfactory. Pet. App. 19a-20a. Petitioner's reliance on past performance appraisals is unfounded. *See Hines v. Hillside Children's Center*, 73 F. Supp.2d 308, 315 (W.D.N.Y. 1999). In fact, the evidence is uncontroverted that Petitioner was not performing her job satisfactorily and was terminated for her own misconduct. Petitioner attempts

to sidestep this issue in the petition, arguing, erroneously, that she should not have been terminated for a single "no-call" violation.[5] Pet. 4. However, the undisputed evidence shows that Petitioner was not terminated simply for failing to take call, but rather for a pattern of misconduct including "insubordination, open defiance or disregard of a supervisor's instruction . . . failure to follow procedures of critical importance to [her] job . . . conduct which is harmful to [GHCC], its residents, families, associates, vendors or others . . . abusive, disruptive or offensive language or actions . . . [and] failure to exhibit customer service." Pet. App. 24a. Furthermore, Petitioner's statement that "[n]o one is terminated for first refusal by rule" is factually incorrect. Pet. 4. The evidence shows that GHCC has no such rule or policy and that her termination was consistent with its policies.

Petitioner also failed to establish that employees outside of her protected class were treated differently. Contrary to her assertions, Petitioner produced no competent evidence demonstrating that white employees were treated differently with regard to discipline and job support. The petition erroneously states that a white nurse was not discharged for failing to take call. Pet. 4. In fact, the uncontroverted evidence establishes that a white male nurse, Scott Hoops, was terminated after he failed to take call. Petitioner was not Hoops' supervisor nor does she have personal knowledge of

[5] Nurses at GHCC were required to be on-call for one week, running from Monday to Monday, several times a year. Nurses were paid extra for each week they were on-call. The on-call nurse was required to carry a pager and had to respond to pages within 15 minutes. If GHCC had a staffing shortage due to a call-out and could not find either a volunteer to cover the shift, GHCC would page the on-call nurse to come in as a last resort.

the events leading to his termination or later rehiring. Petitioner's own unsupported assertions regarding Mr. Hoops are insufficient to support her claim that she was treated differently. *See McKiver v. G.E. Co.*, 11 F. Supp.2d 755, 759 (M.D.N.C. 1997). The other individual mentioned by Petitioner, Brenda Smith, is also African-American and thus could not serve as a similarly-situated comparator *outside* the protected class. The District Court correctly found that Petitioner had not produced any evidence to show that other nurses outside the protected class engaged in the same pattern of misconduct as Petitioner. Pet. App. 24a. Petitioner thus failed to establish all of the elements of a *prima facie* case of discrimination.

Even if Petitioner had established her *prima facie* case, the Court of Appeals correctly affirmed the District Court's finding that Petitioner produced no competent evidence to rebut the legitimate, nondiscriminatory reasons Respondents proffered for her termination. Pet. App. 21a-22a. Petitioner's evidence, which the District Court struck, consisted only of "self-serving allegations and conclusions." *Id.* The District Court correctly stated that "mere speculation as to an employer's discriminatory motive is insufficient to survive a summary judgment motion. *Id.* (citing *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985)).

C. The Court of Appeals Correctly Affirmed The District Court's Grant of Summary Judgment To Respondents On Petitioner's Retaliation Claim.

A plaintiff lacking direct evidence of retaliation must produce evidence showing that: (1) she engaged in protected activity; (2) the employer took adverse employment action against her; and (3) a causal connection existed between the first two elements. *King v. Rumsfeld*, 328 F.3d 145, 151 (4th Cir. 2003). If the plaintiff establishes her *prima facie* case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions, which, if believed by the trier of fact, would support a finding that illegal retaliation did not cause the allegedly adverse employment actions. *Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F.3d 536, 543 (4th Cir. 2003). Once the employer meets its burden of production, the presumption raised by the *prima facie* case "drops out of the picture" and the burden shifts back to the plaintiff to show that the employer's stated reason was merely a pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, *citing St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

The petition misstates numerous facts regarding this claim. First, the petition mischaracterizes the nature of the concerns raised at the employee meetings. Pet. 2. Second, the petition incorrectly claims that Respondents did nothing to address the concerns raised at these meetings. *Id.* The uncontroverted evidence demonstrates that Respondents addressed concerns, scheduled additional meetings, and adopted recommendations of the participants. Third, the petition erroneously states that Petitioner engaged in

protected activities as late as June. *Id.* at 6. In fact, it is undisputed that the last alleged protected activity occurred in April, 2001.

The District Court found that Petitioner failed to establish the third element of her *prima facie* case in that she could not show a causal connection between the protected activities, in this case two employee meetings, and her termination. Pet. App. 25a. Contrary to Petitioner's assertions, the uncontroverted evidence demonstrates that she was not terminated after a series of mistreatments, but rather, was terminated because of her own misconduct. The Court also found that Petitioner failed to show that any of Respondents' reasons for her termination were a pretext for discrimination. *Id.* Petitioner again attempts to rely on her erroneous allegation that she was fired simply for failing to take call and her unsupported claim that employees outside of her protected class were treated differently. As discussed above, the record demonstrates that Petitioner was fired for multiple rule violations and was unable to identify any similarly-situated individuals who were treated differently. As such, the Court of Appeals did not sanction a departure by the District Court from the accepted and usual course of judicial proceedings when it affirmed the denial of Petitioner's retaliation claim.

D. The Petition Fails To Address Petitioner's Full Evidentiary Burden Under *McDonnell Douglas.*

With regard to both her discrimination and retaliation claims, Petitioner's argument is focused entirely on the District Court's analysis of her *prima facie* case. *See* Pet. 4-7. The petition fails to confront the District Court's determination that Petitioner failed to rebut Respondents'

proffered reasons for her termination or point to any evidence that could show these reasons to be pretextual. Furthermore, any evidence that Petitioner might point to has been struck.

As such, even if Petitioner could demonstrate that the District Court incorrectly determined that she failed to establish her *prima facie* case, and thus arguably departed from the accepted course of judicial proceedings on a summary judgment motion, the petition is futile. The petition ignores the second half of Petitioner's evidentiary burden under *McDonnell Douglas*. Furthermore, Petitioner has waived any appeal of the ruling striking all evidence that could conceivably meet this burden. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition does not present any issues requiring this Court's review. Accordingly, the petition should be denied.

Respectfully submitted,

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